

1                   IN THE MATTER OF:

2                   US BEVERAGE, INC., Plaintiff,

3                   vs.

4                   JOHN BUSTER WALKER, II,

5                   and TRIDENT MARKETING, INC., Defendants.

6 -----  
7                   JOHN BUSTER WALKER, II,

8                   and TRIDENT MARKETING, INC.,

9                   Counterclaim Plaintiffs,

10                  vs.

11                  US BEVERAGE, INC.,

12                  Counterclaim Defendant,

13                  and

14                  GRADY DOWLING KITTRELL,

15                  THOMAS GOIN CLARK, III,

16                  and NORMAN "BUDDY" TODD,

17                  Third Party Defendants.

18  
19                  CIVIL ACTION NO.

20                  2:06-CV-496-SRW

21  
22                  DEPONENT: THOMAS GOIN CLARK, III

23                  DATE: November 16, 2006

## STIPULATIONS

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA  
NORTHERN DIVISION

US BEVERAGE, INC.,  
Plaintiff,

vs.  
JOHN BUSTER WALKER,  
II, and TRIDENT  
MARKETING, INC.,  
Defendants.

CIVIL ACTION NO.  
2:06-CV-496-SRW

JOHN BUSTER WALKER,  
II, and TRIDENT  
MARKETING, INC.,  
Counterclaim  
Plaintiffs,

vs.  
US BEVERAGE, INC.,  
Counterclaim  
Defendant,

and  
GRADY DOWLING  
KITRELL, THOMAS GOIN  
CLARK, III, and  
NORMAN "BUDDY" TODD,  
Third Party  
Defendants.

\* \* \* \* \*  
DEPOSITION OF THOMAS GOIN CLARK, III,  
taken pursuant to notice and stipulation on  
behalf of the Defendants/Counterclaim  
Plaintiffs, in the Law Offices of Copeland,  
Franco, Screws & Gill, 444 South Perry Street,  
Montgomery, Alabama, before Tiffany B.  
Beasley, Certified Court Reporter and Notary  
Public in and for the State of Alabama at  
Large, on November 16, 2006, commencing at  
8:57 a.m.

It is stipulated and agreed by and

between counsel representing the parties that  
the deposition of **THOMAS GOIN CLARK, III**, may  
be taken before Tiffany B. Beasley, Certified  
Court Reporter and Notary Public in and for  
the State of Alabama at Large, without the  
formality of a commission; and all formality  
with respect to other procedural requirements  
is waived; that objections to questions, other  
than objections as to the form of the  
questions, need not be made at this time, but  
may be reserved for a ruling at such time as  
the deposition may be offered in evidence or  
used for any other purpose by either party as  
provided by the Federal Rules of Civil  
Procedure.

It is further stipulated and agreed by  
and between the parties hereto and the  
witness, that the signature of the witness to  
this deposition is hereby waived.

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## APPEARANCES

FOR THE PLAINTIFF/COUNTERCLAIM DEFENDANT/THIRD  
PARTY DEFENDANTS:

**C. NELSON GILL, ESQUIRE**

Copeland, Franco, Screws & Gill

444 South Perry Street

Montgomery, Alabama 36104

FOR THE DEFENDANTS/COUNTERCLAIM PLAINTIFFS:

**RAYMOND L. JACKSON, JR., ESQUIRE**

660 North College Street

Suite D

Auburn, Alabama 36830

ALSO PRESENT:

GRADY DOWLING KITRELL

JOHN BUSTER WALKER, II

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DEFENDANTS' EXHIBITSPage

1 Composite Exhibit 175

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1 A. I know for sure that John and I did. And I  
2 believe Grady did on at least one occasion,  
3 but I don't recall.

4 Q. So you said there was at least one occasion  
where John Walker voted --

6 A. On all occasions, John agreed.

7 Q. Are there any minutes from any of these  
8 meetings?

9 A. No.

10 Q. Do you have any notes or any other documents  
11 that would verify these votes?

12 A. I don't -- possibly. We tried to establish  
13 meetings, but -- and we have notes on some  
14 meetings. I'm not sure if we have notes on  
15 that particular meeting.

16 Q. Can you check your corporate records and --

17 A. I would.

18 Q. And if you do have those notes, can you  
19 provide to your attorney to provide to us?

20 A. Yes.

21 Q. And these votes you're talking about, would  
22 they have occurred after the merger?

23 A. Yes.

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1 Q. How do you claim that Mr. Walker's moving to  
2 Texas has harmed US Beverage?

3 A. I claim that there is an inability for the  
4 partners to meet on a regular basis, an  
5 efficiency in our sales effort, because much  
6 of his time is spent travelling just to his  
7 first stop. Our customers -- most of our  
8 customers are Monday-through-Friday people, so  
9 if one day in and one day out, 40 percent of  
10 his time is just travelling to the first stop  
11 in that week. But -- and the inability to  
12 establish a good working relationship just  
13 simply because he's not there and the partners  
14 aren't meeting every day. That would be it.

15 Q. Do you allege that John refused to travel?

16 A. No.

17 Q. Is any of US Beverage's business, I guess, to  
18 the west of here, from Montgomery going west  
toward Texas; do you have any business that's  
west of Montgomery?

21 A. Yes. We have Mississippi and Arkansas and  
22 south Texas.

23 Q. In terms of proximity of that business, then,

1 let's say Arkansas and Texas, proximity-wise,  
2 how does Houston compare to Montgomery?

3 A. As -- is it closer? Are you asking me that?

4 Q. Yes.

5 A. Geographically?

6 Q. Yes.

7 A. I don't know. I know -- I know Corpus  
8 Christi, Texas, is closer to Texas than it is  
9 to Montgomery, but I don't know about the  
10 other states. I think it's further away, if  
11 I'm not mistaken.

12 Q. Okay. So you think that Houston is further  
13 away from Arkansas than Montgomery is?

14 A. Travel time-wise, I think it is.

15 Q. In Mr. Walker's role of being vice-president  
16 of sales for US Beverage, do you think it was  
17 more important for him to be on the road  
18 making sales or to be physically in Montgomery  
19 at meetings?

20 MR. GILL: Object to form.

21 A. I think that it was equally important.

22 Q. If the -- if the -- if the other partners in  
23 US Beverage, including you, were upset about

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1 John living in Texas, why didn't you and Grady  
2 just buy out John?

3 A. Well, we eventually attempted to do that.

4 Q. Okay. When did you attempt to do that?

5 A. I think we had a buyout offer in  
6 December 2003. And I'm saying that because of  
7 a document that I saw at one of the  
8 depositions, would be the first time, I think.

9 Q. Prior to that buyout offer, were you and Grady  
10 okay with John being in Texas?

11 A. No.

12 Q. Why did US Beverage decide in October of 2003  
13 to change a compensation scheme for  
14 Mr. Walker?

15 MR. GILL: Object to the form.

16 A. We were -- if I'm not mistaken, we were  
17 changing the compensation scheme for all of  
18 us, and so we changed John's compensation  
19 scheme, Mr. Walker's compensation scheme, as  
20 we changed all of the compensation schemes.

21 Q. Well, how did Mr. Walker's compensation scheme  
22 change in October of 2003?

23 A. He was -- his compensation scheme, I believe,

1 included a salary plus commission.

2 Q. Were you or Grady placed on a salary plus  
3 commission at that time?

4 A. No.

5 Q. Why not?

6 A. Well, the -- the sales model, we believed, was  
7 based on -- the sales model that we were  
8 trying to develop was the salary plus  
9 commission, with also a portion of that  
10 commission being based on relationships. And  
11 we felt that was the best way of -- that was  
12 the best incentive package for a salesperson,  
13 or a person involved in sales.

14 Q. Were you and Grady put on a set salary at that  
15 point in time?

16 A. We were put on salary. I mean, we were always  
17 on salary.

18 Q. Did Mr. Walker consent to having a salary  
19 based on commission?

20 A. Yes.

21 Q. Do you have any notes or minutes reflecting  
22 that consent?

23 A. I don't know. I can look and see.

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1 Q. Can you check?

2 A. Yeah.

3 Q. Do you recall what the amount of sales  
4 Mr. Walker needed to reach in order to receive  
5 his maximum salary?

6 A. No.

7 Q. After Mr. Walker was placed on commission, do  
8 you know why the company did not pay any sales  
9 commissions to him until August of 2004?

10 MR. GILL: Object to the form.

11 A. I don't recall that it was August 2004. I  
12 don't know.

13 Q. Do you know when Mr. Walker started submitting  
14 sales commission reports?

15 A. No.

16 Q. Do you know if it would have been in December  
17 of 2003?

18 A. I don't know.

19 Q. Do you recall there being a gap between Mr. --  
20 gap in time between Mr. Walker's submitting  
21 sales commission reports and the company  
22 paying sales commissions to Mr. Walker?

23 A. I don't recall that, Raymond -- or

1 Mr. Jackson. I'm sorry.

2 Q. That's fine.

3 A. -- however, I wasn't involved in payroll at  
4 that time. That was one of the accounting  
5 duties that -- or part that Grady was involved  
6 in, and so -- and there's a lot of these  
7 questions that you ask me, I just wasn't  
8 involved in those. I was told at the last,  
9 which was in accordance with the way that we  
10 designed the company.

11 Q. Did you and Mr. Kittrell have to approve  
12 Mr. Walker's commission request?

13 A. A formal commission -- or a formal approval?  
14 I wasn't -- I didn't have to. I wasn't  
15 involved in that.

16 Q. Who would have been in charge of that at that  
17 time?

18 A. John and Grady would have been involved in  
19 that aspect of it.

20 Q. At the time that Mr. Walker's compensation was  
21 changed in October 2003, did he have any other  
22 duties with the company other than sales?

23 MR. GILL: Object to the form.

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1 A. Official -- we had no job descriptions, so was  
2 there an official or unofficial duty? That, I  
3 couldn't tell you. His -- I can only go back  
4 to our original agreement, was that I would  
5 handle everything so that he could totally be  
6 involved in sales.

7 Q. Do you know if Mr. Walker's responsibilities  
8 with US Beverage changed in October of 2003?

9 A. No, I don't know if they did or not. I  
10 believe that they were more focused on sales.  
11 And that was the point, that if he was to  
12 operate as a commission salesperson, then he  
13 should be given the freedom to sell and to  
14 manage the sales effort.

15 Q. Okay. Did you have any role in the company --  
16 and let's talk about the period October 2003  
17 to roughly July of 2005 -- in determining  
18 which expenses would be reimbursed by the  
19 company?

20 A. Yes.

21 Q. And what was your role as -- as to that?

22 A. My role was to analyze what we could afford to  
23 pay out and determine if we could pay

territory"?

**A. Uh-huh.**

**Q. How is that?**

**A. We had accounts there, and it was one of the -- it was probably the pick state that we had mapped out for our company. If you look at the business that we're involved in and the density of population, it's the prime state in that group.**

**Q. Which accounts did you have in North Carolina?**

**A. We had several. I don't remember what they were at the time.**

**Q. You can't remember any clients at all?**

**A. That was John's area, not mine. I'm operations. And, you know, we had, at one time, a thousand customers -- we had over a thousand customers. I just can't remember them all.**

**Q. Are you saying a thousand customers in North Carolina?**

**A. No. We had over a thousand customers company-wide. My -- I had the task of -- of getting proper service with two or three**

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**service people in a multi-state area, and it was more than a full-time job, and that's where my focus was. Not in memorizing clients' names. But I do know that we had customers in North Carolina. I'm not sure of the importance of that, but their names won't change the fact that's where they are. And I have records that we had clients in North Carolina.**

**Q. Okay. Do you have records that would show when you acquired those clients in North Carolina?**

**A. I'm not sure if we would or not. That, I don't know. I know that I started -- one of the things that I implemented was I started implementing a plan to document when we acquired clients, so I might have some of those, but some of those, I might not, because I had to go back and retrofit some of that information.**

**Q. Can you search your records --**

**A. Sure.**

**Q. -- and provide those records to your attorney?**

**A. Uh-huh.**

**Q. And you mentioned that you called -- I think you called North Carolina a prime state. Was there some sort of marketing study done by US Beverage of North Carolina?**

**A. Yeah.**

**Q. Okay. Describe the study.**

**A. I looked at the census -- I acquired the census records for all of the states and looked at the population density and felt like -- or looking at specifically the number of people per square mile, feeling like that's the most for the kind of business we did. That -- that was the -- that was my factor in determining which states would be most advantageous to go to, and that's what I did.**

**Q. Did you hire any outside consultants in identifying prime states?**

**A. No. It wasn't an official one. We didn't have the money to do an official, you know, elaborate study like that. We could barely pay our bills.**

**Q. Are there any notes or minutes from any**

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**meetings in which you discuss North Carolina as a prime state for development?**

**A. No minutes, no, sir.**

**Q. Nothing in writing at all discussing that?**

**A. No. Our meetings were long and protracted, and we would start minutes and never finish them.**

MR. JACKSON: Can we take just a brief break, five minutes?

MR. GILL: Sure.

(Brief recess taken.)

**Q. You mentioned some census data for North Carolina. Where did you obtain that data from?**

**A. Internet.**

**Q. Was it free data?**

**A. Yes.**

**Q. Do you recall any proposal to sell Juice Alive to day care centers?**

**A. Yes.**

**Q. Do you recall if that proposal was before or after this telephone conversation that you mentioned with John Walker?**

1 Q. So I guess when you say "shipping costs,"  
 2 you're talking about, I guess, shipping the  
 3 product to US Beverage?  
 4 A. **I believe we paid for the shipping of anything  
 5 involved in that, if I'm not mistaken.**  
 6 Q. Okay. Well, you've already touched on it.  
 7 Why don't you describe for us in as much  
 8 detail as you can why you claim that US  
 9 Beverage owns the name Juice Alive?  
 10 A. **The Juice Alive name was developed -- although  
 11 I don't recall the date that it was developed,  
 12 I do recall that it was a date when our  
 13 vice-president of sales, who was initially  
 14 given -- or given on the front end,  
 15 responsibility of marketing and developing our  
 16 sales program, and while John -- while  
 17 Mr. Walker was on our payroll, that that brand  
 18 was developed. I think I just -- mumbo jumbo  
 19 sentence. But -- and that it was -- and that  
 20 it's John's responsibility as the  
 21 vice-president of sales -- his job was to  
 22 develop our -- and market our products. And  
 23 at the time that he was developing Juice**

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1 **Alive, he was being paid full salary; he was  
 2 using our time, our phone, our contacts, US  
 3 Beverage contacts; he was using our gas card;  
 4 he was using US Beverage's knowledge of the  
 5 industry to develop these things, and he was  
 6 paid to develop those things; and that the --  
 7 certainly, the principal area of -- the areas  
 8 of distribution encompassed those areas that  
 9 we distributed -- that we distributed as a --  
 10 that US Beverage distributes as a company.**

11 Q. Anything else? I want to make sure that  
 12 there's anything else that you claim shows  
 13 ownership of the trademark.

14 A. **For US Beverage?**

15 Q. Yes.

16 A. **I believe that we told John when he  
 17 presented -- when it was presented to each of  
 18 us, that we told John that we didn't -- that  
 19 he didn't have the authority to do this  
 20 outside the parameters; he didn't have the  
 21 authority to compete against us; he didn't  
 22 have the authority to develop something using  
 23 US Beverage for his own personal use, and**

1 **certainly not to compete against us. And this  
 2 was said to John by me the minute I heard that  
 3 there was another brand, or that he had  
 4 developed that brand and was planning on using  
 5 it against us. And in my conversations with  
 6 Grady, Grady said the same thing. So John was  
 7 notified on the -- on the front end by both of  
 8 us, and we were adamant about it in every  
 9 conversation, that the brand was ours. When  
 10 we started using the brand, we didn't pay for  
 11 it. It wasn't until later on, when we agreed  
 12 to pay for it as part of a buyout plan, that  
 13 we would give John the brand and pay for it,  
 14 that we ever started paying for it, and the  
 15 whole thing got out of control and, you know,  
 16 became a weapon. Our own tool became a weapon  
 17 to be used against us.**

18 Q. Okay. Like I said, I want to give you a  
 19 chance. If there's anything else, I want to  
 20 get it fully on the record, any facts or  
 21 evidence that you're aware of that supports  
 22 your allegation that US Beverage owns Juice  
 23 Alive.

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1 MR. GILL: Object to the form.

2 A. **Those are the things that I can think of right  
 3 now. But I would not want to be held that  
 4 this is the complete sum of everything that I  
 5 think, or we'd be here past 1 o'clock. Just  
 6 want to -- but that's a summary of things.**

7 Q. Okay. Well, if there's any other facts or --  
 8 that you're aware of --

9 A. **I'd have to --**

10 Q. We can stay here as long as we need to. We  
 11 can reconvene the deposition if we have to.

12 A. **I didn't bring my notes with me. If there's  
 13 anything pertinent, I'll submit it. I  
 14 apologize for that.**

15 Q. Well, that's fine. I will ask you, if there  
 16 is anything that is pertinent that you haven't  
 17 told us today, when you review your notes  
 18 later, or whatever, if you'll provide that to  
 19 your attorney.

20 A. **And I would.**

21 Q. What money did US Beverage spend in creating  
 22 the Juice Alive name?

23 A. **Well, we were paying -- we were paying John a**



1 MR. GILL: Well, he is not a lawyer.  
 2 **A. I'm the dumb one. I don't even know what a**  
 3 **TRO is. I mean, what --**

4 MR. GILL: We didn't serve a TRO in  
 this case.

6 **A. What is a TRO?**

7 MR. JACKSON: I asked him if -- in  
 8 response to -- rather than  
 9 signing this, and he says,  
 10 well, you're the attorney; you  
 11 know we couldn't get that done  
 12 in two or three days. Well,  
 13 damn, you know. But we'll go  
 14 forward. Let's take a brief  
 15 break, and we'll...

16 (Brief recess taken.)

17 **Q. Who manufactures the Fruzers brand product?**

18 **A. Supreme Beverage.**

19 **Q. Okay. And who owns the -- I guess, the**  
 20 **formulas for the product?**

21 **A. I don't know.**

22 **Q. Do you know if Supreme claims ownership to the**  
 23 **formulas for the juice product?**

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1 **A. I don't know if they do or not.**

2 **Q. What business do you claim that Mr. Walker has**  
 3 **competed for or taken from US Beverage within**  
 4 **200 miles of Montgomery?**

5 **A. I'd have to look at that and -- I know -- the**  
 6 **only -- the only things I can say for sure is**  
 7 **all of the Alabama business that's within**  
 8 **200 miles -- or I shouldn't say all of the**  
 9 **Alabama business. I know that Mr. Walker or**  
 10 **his representatives have competed against us**  
 11 **in Alabama territories within 200 miles, and I**  
 12 **would have to look at a geographic map to --**  
 13 **or a map of a compass, I guess, to -- to give**  
 14 **you some specifics on that.**

15 **Q. You mentioned Mr. Walker's representatives.**  
 16 **Who are his representatives you're referring**  
 17 **to?**

18 **A. In the -- are you -- I'm referring to in**  
**Alabama as several -- I think we've competed**  
**against Dispensing Systems of Florida, maybe**  
 21 **Dispensing Systems of Georgia, and Dispensing**  
 22 **Systems of Alabama.**

23 **Q. And is it your contention that those companies**

1 are the representative of Mr. Walker?

2 **A. Yes.**

3 **Q. How so?**

4 **A. Well, on one of the brands, they -- or on one**  
 5 **of the bids, they bid Juice Alive. After**  
 6 **the -- there was a period of time after we**  
 7 **sent a letter to Dispensing Systems, they quit**  
 8 **putting that on the bid. But I also contend**  
 9 **that -- at the Alabama trade show, I contend**  
 10 **that just based on what John Walker told me**  
 11 **was that he was working with Dispensing**  
 12 **Systems at the trade show while he was**  
 13 **representing us; that he had set a tentative**  
 14 **arrangement contingent on us succumbing to his**  
 15 **demands that he would start selling to them,**  
 16 **and then they did start bidding Juice Alive on**  
 17 **one of the bids -- at least one of the bids.**  
 18 **I think several of the bids, but...**

19 **Q. You've referred to one bid in particular.**  
 20 **Which bid was that?**

21 **A. I'm not sure.**

22 **Q. Are you aware of any customers that US**  
 23 **Beverage has lost within 200 miles of**

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1 Montgomery due to Mr. Walker's activities?

2 **A. I would have to -- once again, I think we've**  
 3 **lost some in that 200-mile radius, but I would**  
 4 **have -- have to look at a map of that, really,**  
 5 **and with a -- some sort of measurement device.**  
 6 **I do think that we've had to drop our price on**  
 7 **a lot of business due to the competing against**  
 8 **our own partner with our own brand.**

9 **Q. Well, let's limit it to the state of Alabama.**  
 10 **Are you aware of any customers that you've**  
 11 **lost in the state of Alabama due to the**  
 12 **activities of Mr. Walker?**

13 **A. Dispensing Systems didn't do very well against**  
 14 **us. We don't think they -- I think their plan**  
 15 **to put us out of business there hasn't worked**  
 16 **so far, although we have lowered our price**  
 17 **many, many times on a Dispensing Systems bid,**  
 18 **thousands of -- tens of thousands of dollars**  
 19 **worth.**

20 **Q. What about any customers in the state of**  
 21 **Mississippi that US Beverage claims it's lost**  
 22 **due to the activities of Mr. Walker?**

23 **A. That's where I would have to look at the map.**

**I think we've lost a few, but I'm not sure who they might be. Once again, passing out flyers, I was told that passing out flyers, making calls that said \$60 a case when we were at 74.52, we lost some business. I don't know exactly who they are, but we certainly have had to lower our prices, and it's cost us tens of thousands of dollars.**

**Q.** Would your records reflect which customers in Mississippi you claim you've lost due to the activities of Mr. Walker?

**A.** Yeah. And if I saw a map, I could tell you, but I -- or if I saw -- if I looked at a map and took my little measuring device, figured out what the radius was -- would it show us -- I already know -- I don't know that our records would actually -- there's nothing that says, lost due to John Walker or lost due to Juice Alive or anything like that, but we know who we do business with and who we don't do business with. And, once again, we've got about 1200 accounts. Not all schools. But I just don't -- I don't know everybody and

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**everybody's geography.**

**Q.** And make sure I understand. So what you're saying is if you -- are you saying it is possible or not possible that if you looked at your records that you could --

**A.** If I look at the records, I could tell you, yes.

**Q.** Is that something you could look at later and provide that information to your attorney?

**A.** Yes.

**Q.** Thank you. Have you made any statements regarding John Walker or Juice Alive to any -- I guess start with anyone.

**A.** I've made millions of statements.

**Q.** Okay. Well, what about since this lawsuit has been filed?

**A.** I've made lots of statements.

**Q.** Okay. Who do you recall having made statements to regarding -- and I'm not talking about your attorney or anybody associated with your attorney or me or anything in this litigation; I'm talking about third parties not involved -- not involved with US Beverage

or involved in this dispute.

**A.** My statements -- I -- my statements concerning John have all been very favorable to John. Any statement I've made -- and I've made many of those frequently -- to customers, to friends, to people who are outside the business that are just -- that are wondering what's going on, I have oftentimes said that John is one of the nicest fellows you'll ever meet; he's a darn good salesperson, and I do not criticize John to our customers, to anybody. This isn't a personal matter. But I do not say bad things about John to anybody.

**Q.** What about statements you've made regarding Juice Alive or the Juice Alive brand to any third party? Again, not talking about anybody -- any of your attorneys or anybody inside US Beverage, but to third parties.

**A.** The only thing that I've said about the Juice Alive brand, I wrote a letter to the child nutrition directors of Mississippi who were -- after receiving a lot of complaints, they didn't understand what was going on and that

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**it might cost us some business just born out of confusion. I wrote a letter to them trying to clarify my position on the whole issue.**

**Q.** And is that the letter that's been discussed in the other depositions?

**A.** Which -- which letter is that?  
(Off-the-record discussion.)

**Q.** And I'll show you what's marked as Defendants' Exhibit 5 to the deposition of Norman Todd. Ask him if he can identify the document.

(Defendants' Exhibit 5 was previously marked and is not attached hereto.)

**A.** Yeah. And this is the one that I thought you might be asking about. No, I did not authorize this. Did not produce this letter.

MR. GILL: Look at it closely.

**A.** It says it's Buddy Todd's. Sales manager. I didn't do it.

MR. GILL: Well, I understand but look at the -- all the pages.

**Q.** I believe there was an attachment to that e-mail that you have.



1 **A. I'm saying that --**  
 2 **Q.** Again, I don't want to put words in your  
 3 mouth. The other -- the other --  
 4 **A. Oh, I'm sorry --**

5 **Q.** Mr. Todd testified that he sent your letter  
 6 out via e-mail.

7 **A. I didn't do that. I thought that's what you**  
 8 **were asking me to --**

9 **Q.** Okay.

10 **A. This is the one that I authored, yes.**

11 **Q.** And you recognize that? You read through it?

12 **A. I didn't read the whole thing, but it looks**  
 13 **like --**

14 MR. GILL: And just for the record,  
 15 this is -- I guess, Bates  
 16 number is 165 and 166 of  
 17 your -- of John Walker's  
 18 production.

19 MR. JACKSON: Right.

20 MR. GILL: I just -- there are a  
 21 couple of documents. I don't  
 22 want any confusion.

23 **A. This appears to be. I've read through it, and**  
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1 **it appears to be the document that I wrote.**

2 **Q.** I'll ask you to look at what's marked as  
 3 Defendants' Exhibit 4 of Norman Todd's  
 4 deposition. See if you recognize that  
 5 document?

6 (Defendants' Exhibit 4 was  
 7 previously marked and is not  
 8 attached hereto.)

9 **A. I recognize it from Buddy Todd's deposition.**  
 10 **That's the first time that I had seen this,**  
 11 **and I don't know where it came from.**  
 12 **Certainly did not authorize it or author it or**  
 13 **have any hand in that.**

14 **Q.** Do you know if that letter was sent to any  
 15 third parties?

16 **A. I believe it was not sent to anybody.**

17 **Q.** What's your belief based on?

18 **A. That Buddy asked me if he could send something**  
 19 **to the child nutrition directors, and I said**  
 20 **in no way could he do that; that everything**  
 21 **that we did I first ran by our attorney to**  
 22 **make sure that we weren't stepping out of**  
 23 **line; and that -- that I did not even want him**

1 **to produce anything like that for my review;**  
 2 **that that's not his area of responsibility.**

3 **Q.** Prior to his deposition, had you seen this  
 4 document?

5 **A. Not that I recall.**

6 **Q.** Are there any other letters sent out to any  
 7 other third parties regarding Juice Alive  
 8 or --

9 **A. There was one letter sent out to Dispensing**  
 10 **Systems -- there was a legal letter.**

11 **Q.** And I'm not asking about communications from  
 12 your attorney. I know --

13 **A. None that I'm aware of.**

14 **Q.** Aware of any other e-mails, any other  
 15 communications to third parties?

16 **A. By me to -- by me or anybody?**

17 **Q.** By you specifically. Talking about you first.

18 **A. I don't recall anything that I've sent. I'm**  
 19 **not on direct communication with most people.**  
 20 **I can't think of anybody -- any customers that**  
 21 **I'm in direct communication with.**

22 **Q.** Are you aware of any e-mails sent by anybody  
 23 else at US Beverage regarding Juice Alive to

1 any other third parties?

2 **A. No, I'm not aware of any. I'm aware of some**  
 3 **by our customers stating that John is -- that**  
 4 **Mr. Walker and one of his -- juice**  
 5 **representative were contacting them stating**  
 6 **that they weren't involved with US Beverage**  
 7 **and wanting to know what the real story was.**

8 **Q.** Do you know if there was a reply sent to those  
 9 customer e-mails?

10 **A. I know there was not one by me, and I know**  
 11 **of -- I know of no others, you know, honestly.**

12 **Q.** Does US Beverage keep its company e-mail?

13 **A. Do we keep -- meaning --**

14 **Q.** For instance, e-mails that are sent by your  
 15 employees. First, let me ask you, does US  
 16 Beverage have its own e-mail service or e-mail  
 17 accounts?

18 **A. Yes.**

19 **Q.** Is that the accounts your -- your employees  
 20 would use to communicate with customers?

21 **A. Most of them -- the only person -- the answer**  
 22 **is yes, I suppose. Yes.**

23 **Q.** And e-mails sent pursuant -- out of that

account, that US Beverage account, e-mail  
account, are those e-mails kept  
electronically?

**A. Mine are. But we have the opportunity to  
purge those from time to time, so they -- the  
system naturally keeps them, and you have to  
do something to delete them.**

**Q.** Is there a method by which you could check to  
see if there was any e-mails still in  
existence --

**A. Well, I mean, I could go on each computer,  
yeah, or get with -- the only person who would  
be e-mailing to customers that I could think  
of possibly would be Buddy and possibly me.  
But I know that I didn't. But I'm --  
certainly -- assuming that it's appropriate,  
you'd certainly be welcome to that.**

**Q.** Okay. How do you contend that Mr. Walker has  
used US Beverage's proprietary knowledge that  
he has gained through his association with US  
Beverage?

MR. GILL: Object to the form.

You can answer that.

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THE WITNESS: Okay.

**A. As I stated earlier, to a significant number  
of our -- at the time of the -- or at the time  
that Mr. Walker started competing against  
himself, against US Beverage, to the line  
share of our business -- he was US Beverage.  
It's a relationship business, and it's not a  
loyalty to a -- it's not a loyalty to a brand  
as much as -- or a company as much it is a  
loyalty to the relationship.**

**Mr. Walker was receiving --  
Mr. Walker had prepared up to the time that  
he was no longer actively involved in the  
company, kept all of those contacts in a  
couple of forms on his -- you know, his  
computer at home, on his PDA thing, whatever  
that thing is called, in his phone, phone  
records, phone numbers, and he also received  
regular copies of our books, and he also  
prepared every one of our bids that I can  
recall. And so he had a -- very, very  
exponent knowledge since they all -- even at  
the show, Mississippi show, I presented John**

**still as our partner, believed that John was  
with US Beverage. And -- and as our single  
sales force, they wouldn't know anybody else  
but John. And John would know -- and John had  
every one of those contacts. He knows our  
prices, he knows what we pay for our product  
because he received a royalty on the 1.20  
agreement. Over and above our invoice price  
we invoiced, we sent him POs along with  
Supreme, so he knew exactly what we paid for  
the product; he knew how to structure our  
bids -- or he knew how we structured our bids  
because he had been doing the bidding, and he  
knew every -- John intimately, because he was  
our sales force through -- intimately to every  
facet of that side of the business.**

**Q.** Any other type of proprietary knowledge other  
than what you've already listed?

**A. He knew our financial position; he knew our  
debts, he knew or pay scales, he knew all of  
our employees. You know, in that -- he also  
used -- in developing the Juice Alive brand,  
used our resources and started developing**

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**customers under the Juice Alive name that we  
didn't know about that we felt like were ours  
and did not have access to those. So John --  
John was US Beverage to our customers.  
That's...**

**Q.** You mentioned bids, in preparing bids. Were  
these bids for public contracts?

**A. Yes.**

**Q.** Do you know if your bids would be public  
record?

**A. Yes, our bids would be public record.**

**Q.** What about the identity of your public  
clients, like your clients in school systems  
and so forth; is that information -- would  
that be publicly available?

**A. Now, that, I don't know. Both our bid price  
and our -- and who our clients are, you can --  
if you owned the company, you could find that  
out in seconds. Just look at your books.  
We -- you have to work very, very hard at  
times to get bid prices and find out who those  
customers are without just driving to the  
location and looking to see who they are. But**

attached hereto.)

**A. The significance, once again, shows the ineffectiveness of John's sales effort. I believe, if I can read this correctly, that in 2004, we actually had more customers than we had in 2005; that we were losing them faster than we were gaining them, and for a growth company, that's not very good. And when you're paying out the kind of monies we're paying, that's not a great -- that's not a great issue.**

**Q. And --**

**A. But also -- it also shows that back when -- in November -- I keep hearing people talk about -- of the previous year, when we're talking about -- or whenever it was, when we're saying, well, do we develop a brand, do we devote our attention to the brand, do we spend our money there, it shows that when we said, well, we want to do it, but that's not the most important thing; that what we need to do is to go door-to-door selling because we are losing customers -- we are losing volume;**

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**we are not going to make it as a team if we don't sell. This shows that -- that we over the past two years -- and we were over a thousand -- a thousand something the previous year, that -- that this just wasn't working.**

**Q. Well, and one point of clarification, this document is actually cut off along the right margin; is that correct?**

**A. Looks like it.**

**Q. And when you say comparing two thousand, I guess, four, 2005, we actually can't read these -- these don't read 2004, 2005?**

**A. What do they read?**

**Q. Well, I don't -- tell me what they read.**

**A. Well, you're handing me an incomplete document, and --**

MR. GILL: Whoa, whoa. I would have produced that in that manner, so if it's cut off --

**A. Well, I'm sorry --**

MR. GILL: If it's cut off, again, I will provide one. I didn't realize it. I didn't look

through every page of every --

MR. JACKSON: And I understand,

but -- you know, and, I guess,

I'm just trying to clarify it

for the record. You know, if

we've got a complete document

that's not cut off, definitely

we'd like to see it because --

MR. GILL: I will go through every

one of those documents that

look like that, and I will

provide you with another copy

if necessary.

MR. JACKSON: Okay.

MR. GILL: That's all I can say.

MR. JACKSON: Okay.

**Q. And let me ask you, Mr. Clark, there's more writing, down on this margin. To the extent you can read it, can you read the writing below, I guess, the line that starts with 908?**

**A. This seems a little unfair. When I filled in the blanks here, I'm chastised for it. Now you want me to fill in the blanks here?**

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**Q. I want you to read what you can read. If you can't read it, tell me.**

**A. Lost Customy (phonetic), sold by someone other than Joe recently cost to a Juice Alive competitor.**

MR. GILL: If you know what it says --

THE WITNESS: I know what it said right there, Nelson. For god sakes, I mean, give me the rules here so I can -- I can work on it.

**A. Somewhere on the document here, I have blackened out in some ink customers that we've had -- there was -- along with this, there was blackened out somewhere, there was customers that I knew of at that moment when I created this document that we had lost them to Juice Alive. On this thing that's been produced as evidence to me, it's not on here.**

MR. GILL: Let's take two minutes and see if we can work out any --

(Brief recess taken.)

MR. JACKSON: Did you have a better copy of it or --

MR. GILL: I mean, I do. I didn't look for it right now. I'm sorry. I was trying to get through with it.

MR. JACKSON: That's fine.

MR. GILL: If I do -- I mean, I don't recollect that the words are cut off.

MR. JACKSON: Yeah. It's probably something the copy machine did. Yeah, I'm sure you didn't, and...

Q. Okay. I think you said -- before our break, I think you mentioned that your recollection of this -- of the document like this was there was a document that had customers scratched through; is that what you're --

A. **There was some customers highlighted, yes.**

Q. Okay. And just flipping through that

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document, is it -- I personally have not seen any highlighting on that particular document, Exhibit 20. Do you?

A. **Well, I don't see anything here. But I authored this, and I -- the reason I produced it was to illustrate a point. I would have to -- and I actually -- and I don't know -- but that's what this -- that's what this line was for, was to illustrate the customers that we had lost by someone other than -- or customers sold by someone other than John -- let's see, hold on a second. Lost customer -- oh, I'm sorry. I think there was three -- there may have been three different things. There's three points. Lost customer sold by someone other than John -- or two points. Recently lost to a Juice Alive competitor. So there's two -- there's two colors here highlighted, I believe.**

Q. Okay. And in that document there, you're not saying that everybody on that -- that three- or four-page list was a lost customer?

A. **No. I think they're highlighted in a color**

pen may be. I'm -- now that you mention it, you're probably right. I don't remember exactly everything about this, but I think that's what the intention was.

Q. Well, we'll go on.

A. **So, no, I'm not claiming that this --**

MR. GILL: I mean, I don't want to have to reconvene a deposition over this document.

A. **But to answer the question, I'm --**

MR. JACKSON: Well, I'll probably avoid doing that. I just --

A. **I'm not saying that John lost these customers.**

MR. GILL: I mean, if there's one with colors on it, I'll just produce it. I'm sorry. I really had no intention of --

MR. JACKSON: Yeah. Well, and that's fine if you produce it with colors on it. I just don't want to be surprised at a hearing with this document meaning something other than

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what he's just testified to.

MR. GILL: No. I'll --

A. **And, once again, my apologies. And my third and final clarification, there was three things. One is lost customers, one is sold by someone other than John, and then the third is recently lost to a Juice Alive competitor, so there were three markings on that.**

MR. GILL: And I may very well not have one with it.

MR. JACKSON: Okay. Well, that's fine.

Q. Just if you can -- if you have one, if you'll produce it to us is in color. Or if your attorney doesn't, if you'll give your attorney a copy in color, we would appreciate it.

Let's look at Defendants' Exhibit 21 to Mr. Kittrell's deposition quickly. If you'll identify that document, sir.

(Defendants' Exhibit 21 was previously marked and is not attached hereto.)